Supreme Court, U.S.
FILED
JAN

No. 92-1054

In The

Supreme Court of the United States

October Term, 1992

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.

Petitioner,

v.

DAVID T. JORDAN

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

William C. Partin
Attorney of Record
Matt Partin
Partin & Partin
1310 Carondelet Drive
Suite 330
Kansas City, Missouri 64114
(816) 942-7880
Attorneys for Respondent

January, 15 1993

QUESTIONS PRESENTED

Respondent is not satisfied with Petitioner's statement of the questions presented because Petitioner has failed to address the issues of (1) its procedural defaults regarding the Due Process/Haslip and CEA preemption questions it now seeks to raise, and (2) the findings of the District Court and Eighth Circuit that Petitioner did, in fact, make such defaults. In accordance with Supreme Court Rules 15 and 24.2, Respondent states the following questions which must be taken up before Petitioner's questions.

1. Can or should certiorari be granted or this case be held until decision of TXO Production Corp. v. Alliance Resources Corp., No. 92-479, in light of the following facts regarding petitioner's prolonged procedural default on the Due Process/Haslip question it has now sought to raise as its own Question No. 1:

A. Both the District Court and the Eighth Circuit held, on remand from this Court in Clayton Brokerage Co. v. Jordan, No. 88-1483, 499 U.S. ____, 111 S.Ct. 1298 (1991), that Petitioner had failed to raise any version of the Due Process/Haslip question until after that remand.

B. Petitioner made no attempt from the beginning of this case on December 28, 1982 until after this Court's remand on March 18, 1991 to raise any version of the Due Process/Haslip question, and did not raise it:

(i) by an F.R.C.P. Rule 51 objection or any other means at trial; or,

(ii) on appeal to the Eighth Circuit, or

(iii) in its petition for certiorari in No. 88-1483.

C. Both the District Court and Eighth Circuit conducted, *ex gratia*, a full Haslip review of the punitive damages award and the procedures and standards used to calculate and review it, and found that the award and the procedures and standards met all the requirements of Haslip?

2. Can or should certiorari be granted or this case be held until decision of TXO Production Corp. v. Alliance Resources Corp., No. 92-479, in light of the fact that Petitioner has attempted to mislead this Court into believing that on remand neither the District Court or the Eighth Circuit conducted a Haslip review, by repeatedly making such statements in its petition (pps.9, 10, 18, 19), though both the District Court and the Eighth Circuit conducted full Haslip reviews of the punitive damages award and the procedures and standards used to calculate and review it?

3. Can or should certiorari be granted in light of the following facts regarding Petitioner's prolonged procedural default on the CEA preemption question it has now sought to raise as its own Question No. 2:

A. Both the District Court and the Eighth Circuit held that the affirmative defense of preemption was not pleaded, as required by F.R.C.P. Rule 8(c), or otherwise raised,

B. Petitioner only first raised the CEA preemption question in this Court in No. 88-1483,

C. Petitioner expressly admitted in its petition (p.7) in No. 88-1483 that it chose not to raise the CEA preemption question in the District Court or Eighth Circuit because of the contrary controlling authority of Kerr v. First Commodity Corp., 735 F.2d 281 (8th Cir.1984), holding that the CEA did not preempt an investor's Missouri common law tort claim for actual and punitive damages against his brokerage firm.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	v
Statement of the Case	1
Argument	13
Conclusion	29
Appendix:	
A. Transcript, p. 972, line 11 - p. 976 (net worth)	A-1
B. Transcript, p. 1062, line 10 - p. 1063, line 5 (Instruction Conference Complete Statement of Clayton's Objection to Net Worth Evidence)	A-8
C. Transcript, p. 1097, line 18 - p. 1098, line 3 (Plaintiff's Closing Argument re Net Worth - No Objection)	A-9
D. Clayton "Questions Presented" Section From Previous Certiorari Petition (no. 88-1483)	A-11

TABLE OF AUTHORITIES

Cases:	Page
Bache Halsey Stuart, Inc. v. Hunsucker 248 S.E.2d 567 (N.Car.App.1978). . . .	28
Banker's Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)	13
Browning-Ferris Ind., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989). .	13
Jordan v. Clayton Brokerage Co., 861 F.2d 172 (8th Circ.1988)	14
Jordan v. Clayton Brokerage Co., 975 F.2d 539 (8th Cir.1992).	13
Kerr v. First Commodity Corp., 735 F.2d 281 (8th Cir.1984)	14
Khalid Bin Talal v. E. F. Hutton & Co. 720 F.Supp. 671 (N.D.Ill.1989)	22
Kotz v. Bache, Halsey, 685 F.2d 1204 (9th Cir.1982)	29
Leist v. Simplot, 638 F.2d 283 (2nd Cir. 1980)	18
Mallen v. Merrill Lynch, 623 F.Supp. 203, (D.Ga.1985)	22
Merrill Lynch v. Curran, 456 U.S. 353 (1982)	18
Patry v. Rosenthal & Co., Inc., 534 F.Supp. 545 (D.Kan.1982)	22
Pettigrew v. Oppenheimer & Co., 582 F.Supp. 98 (D.Mass. 1982)	18

Proctor v. Stevens Employment Services, Inc., 712 S.W.2d 684 (Mo.1986). 16

Rice v. Board of Trade, 331 U.S. 247 . 19

Sanders v. Daniel Internat'l Corp., 682 S.W.2d 803 (Mo.1984) 16

TXO Production Corp. v. Alliance Resources Corp., No. 92-479. 15

Other Authorities:

Annotation, Commodities Broker's State-Law Duties To Customers, 55 A.L.R. 4th 394, (1987). 22

Hearings Before the Senate Committee on Agriculture & Forestry: Commodity Futures Trading Act, 93rd Cong., 2d Sess. 23

Johnson, Commodity Futures Trading Act 29 VAND.L. REV. 1,5,8 (Jan.1976) . . . 20

H.R. Rep. No. 97-565 (1982). 24

Hearings on S.2485, S.2578, S.2837 and H.R. 13113 Before The Senate Committee on Agriculture & Forestry. 25

Senate Report No. 94-73 (1974) 27

STATEMENT OF CASE

Respondent is not satisfied with Clayton's Statement because it is substantially inaccurate in its discussion of the Courts' repeated holdings that Clayton waived, by failing to raise, the issues it has now attempted to raise here, (2) it wrongly asserts that on remand from this Court the Eighth Circuit did not conduct a Haslip review, when the Court in fact did so, and (3) it inaccurately states the facts of the case. Therefore, in accordance with Rules 15 and 24.2, a corrected statement on those subjects is provided.

1. Clayton's Waiver And The Courts' Holdings.

Each of the questions which Clayton now attempts to raise was long ago waived by Clayton, as both the District Court and the Eighth Circuit held, after remand from this Court. Jordan v. Clayton Brokerage Co., 975 F.2d 539, 541 (CEA preemption), 542-43 (Due Process/Haslip) (8th Cir.1992), following remand in Clayton Brokerage Co. v. Jordan, _____ U.S. _____, 111 S.Ct. 1298 (1991). Both the District Court and the Eighth Circuit held that Clayton failed to plead the affirmative defense of preemption or otherwise raise it during the trial or appeal, Jordan, 975 F.2d at 541, and both the District Court and the Eighth Circuit held that Clayton failed to raise the Due Process/Haslip question until after this Court's remand to the Eighth Circuit. Jordan, 975 F.2d at 542-43. The history of this case shows that Clayton first raised the preemption and the Due Process/Haslip questions some 6+ and 8+ years after this case began.

a. The History - The Trial

This case was filed on December 28, 1982, raising both CEA and Missouri common law claims against Clayton. Two claims against Clayton were submitted to the jury. Jordan, 861 F.2d at 173. The first claim was based upon the implied private damages action under the Commodity Exchange Act recognized by this Court in Merrill Lynch v. Curran, 456 U.S. 353 (1982). It sought only actual damages. The second claim was based upon Missouri common law. It sought both actual and punitive damages. Jordan, 861 F.2d at 173-74. The jury found in Mr. Jordan's favor on each claim, and awarded him a total of $7,923.50 actual damages and $400,000 punitive damages. Id.

Near the close of his case and as part of his punitive damages claim Plaintiff offered into evidence a series of financial data to prove Clayton's financial condition. Included among the data was Clayton's net worth, which Clayton termed "total stockholders' equity". Ex.48 (Consolidated Statement of Financial Condition). Clayton objected to admission of all the financial data except the net worth/total stockholders' equity figure; it expressly consented to admission of that figure:

> "Our position is that only one figure, that being the total stockholders' equity, which according to this exhibit is $17,491,724, should be read to the jury."

App.,p.1, quoting T.972. Only four days later in the instruction conference did Clayton first make any objection regarding the net worth evidence. App.,pps.8-9, quoting T.1062-63. However, the objection, found-

ed solely on the Equal Protection Clause, was merely directed to the upcoming closing argument and the way in which Clayton anticipated the net worth evidence would be discussed:

> "the argument will be that because this defendant has a certain amount of financial wealth, or put in another way, a certain net worth, that it is more appropriate to punish this defendant than it would be to punish another defendant under similar circumstances who has a net worth that is less than this defendant's."

Id. In the event, no such argument was made and the brief three-sentence discussion of net worth by Plaintiff's counsel passed without objection App.,pps.9-10, quoting T. 1097-98. At no time was any "Due Process" objection to use of the net worth evidence made, contrary to the assertion on Page 7 (4th paragraph) of Clayton's Petition.

b. Post-Trial And Appeal

In neither its post-trial motions, which were denied by the District Court, nor in its appeal did Clayton raise the CEA preemption or any version of the Due Process/Haslip question. Jordan, 861 F.2d at 174 (stating Clayton's grounds for appeal). Far from claiming some kind of inadequacy in the Federal and Missouri standards governing calculation and review of a punitive damages award - which is the gist of the Due Process question Clayton now attempts to raise - Clayton relied on those Federal and Missouri standards to challenge the punitive damages award as excessive under Missouri's common law standards. Jordan, 861 F.2d at 174-77.

After reviewing the Missouri standards and the District Court's extensive findings made under those standards, Jordan, 861 F.2d at 174-75, the Eighth Circuit made its own findings and held that the punitive damages award was not excessive. Id., 176.

Only two constitutional questions were raised. The first was a much-changed version of the Equal Protection objection regarding net worth. Ignoring the facts that at trial it had expressly consented to admission of its net worth figure and stated its objection only as an objection to an anticipated closing argument, Clayton now changed the Equal Protection objection to an argument that the Equal Protection Clause barred all net worth evidence. Jordan, 861 F.2d at 178. The second question was merely whether the Due Process Clause required proof of a punitive damages claim beyond a reasonable doubt. Id., 177-78. After the Eighth Circuit rejected all its arguments Clayton sought review here. Clayton Brokerage Co. v. Jordan, No. 88-1483.

In its Petition For Writ Of Certiorari Clayton made no Due Process/Haslip challenge to the Federal and Missouri standards for calculation and review of a punitive damages award. App., p.11, quoting "Questions Presented" in Petition For Writ Of Certiorari (No. 88-1483). Instead, though it had never raised the question before, it now attempted to raise a Browning - Ferris 8th Amendment excessive fines clause question. Id., Question 1. Its second question was the proof beyond a reasonable doubt question. Id., Question 2. For its third question it once again changed its Equal Protection argument, now casting it in terms of a proposed rule that net worth evidence not be presented

until after the jury has reached "a verdict on defendant's liability (a) for the tort alleged and (b) for punitive damages", and then added a reference to "due process". Id., Question 3. As its final question Clayton raised for the first time the question of preemption by the CEA. Id., Question 4. Clayton's Petition was filed in March 1989, and thus the preemption issue was not first raised until more than six years after this case began.

c. **Remand**

In March 1991, after Haslip was decided, this case was remanded to the Eighth Circuit for reconsideration in light of Haslip, the Order stating that:

> ". . . the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of Pacific Mutual Life Insurance Company v. Haslip, 499 U.S. _____ (1991)".

Clayton Brokerage Co. v. Jordan, 499 U.S. ____, 111 S.Ct. 1298 (1991). The Eighth Circuit in turn remanded to the District Court. Jordan, 975 F.2d at 541. Contending that this Court's remand Order was "without reservation" and allowed it to raise any issue on remand, Clayton filed a series of motions in which it attempted to raise the preemption and, for the first time, Due Process/Haslip questions. Jordan, 975 F.2d at 541.

The District Court ruled that the preemption question was outside the scope of remand, had been waived by Clayton's failure to plead and otherwise raise it, and lacked merit in light of numerous decisions finding that the CEA did not preempt state common

law claims by an investor against his brokerage firm, including the Eighth Circuit decision which the District Court expressly followed: Kerr v. First Commodity Corp., 735 F.2d 281 (8th Cir.1984). Remand T. 71-72.

2. The Haslip Review

As for the Due Process question, the District Court held that Clayton had waived it by failing to raise it in any way until after remand. Jordan, 975 F.2d at 542. But, in addition, in order to provide a complete record, the District Court ruled the question on its merits, finding that the Federal and Missouri standards governing calculation and review of a punitive damages award met Haslip's requirements and, in fact, provided more protection than did the Alabama standards. R.T. 55-71.

The Eighth Circuit did much the same, ultimately holding both that the Due Process question had been waived by Clayton's failure to raise it and that the Federal and Missouri standards governing calculation and review of the punitive damages award fully met all the Haslip requirements. Jordan, 975 F.2d at 542-43. Each of the four questions raised in Clayton's certiorari petition in No. 88-1483 was reviewed, as was the newly raised Haslip question. The Browning-Ferris question was disposed of on the ground that Clayton had dropped it after remand. Jordan, 975 F.2d at 541. The CEA preemption question was disposed of on the grounds that it was outside that scope of the remand for reconsideration in light of Haslip, and had been waived by Clayton's failure to plead it as required by F.R.C.P. Rule 8(c) or otherwise raise it. Jordan, 975 F.2d at 541. The proof beyond a reasonable doubt question was disposed of on the ground that Haslip had re-

solved it. Jordan, 975 F.2d at 541-42. That left only the net worth question and the newly-raised Due Process/Haslip question.

Unable to ignore Clayton's 8+ year failure to raise any version of a Haslip-type Due Process question, the Eighth Circuit held that the question had been waived, pointing out that Clayton had never raised the question until after remand, Jordan, 975 F.2d at 542-43. But, then, *ex gratia*, the Court provided Clayton a full Haslip review, using the net worth question as the vehicle for that.

However, it first noted that Clayton had not preserved the net worth question either. While, Clayton was now presenting the net worth question as a "Due Process" question, it had never done that at trial or on appeal, the Eighth Circuit held; instead, Clayton had presented the question solely as an Equal Protection question, and in that form the question had been ruled against Clayton years earlier. Jordan, 975 F.2d at 542, citing Jordan, 861 F.2d at 178. Having made that record on Clayton's failure to preserve the net worth question, the Court then went on to use the question to conduct a full Haslip review, finding, as had the District Court, that

> "Instruction No. 12 (the punitive damages instruction) and the post-verdict standard of review make what the Court said about the Alabama procedure equally applicable in this case:
>
> 'The application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion

> of Alabama fact finders in awarding punitive damages. The Alabama Supreme Court's post-verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages. While punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extend of defendant's wrongful gain, the fact finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket'".

Jordan, 975 F.2d at 542, quoting Pacific Mutual Life Ins. Co. v. Haslip ___ U.S. ____, 111 S.Ct. 1032,1045 (1991) (parenthetical words added).

Thus, contrary to the assertions on Pages 9 and 10 of its Statement, Clayton received two full Haslip reviews on remand, one by the District Court and one by the Eighth Circuit, despite each Court's holding that Clayton had waived the Due Process/Haslip question by not raising it until after remand, 8+ years into the case.

3. The Trial And Evidence

Trial began on November 10, 1986. The evidence showed that since 1978 the Manager of and chief broker in Clayton's Kansas City office, other personnel there, and various officers in the St. Louis headquarters,

including the heads of the Compliance and Legal Departments, had carried out a plan for defrauding customers throughout the Midwest, the customers all having accounts in Clayton's Kansas City office. Infra. Testimony from Martha LaQuey, a former Clayton employee who had worked in the Kansas City office, from various employees and officers still at Clayton, and from Plaintiff and other customers, along with Clayton's own records, showed that the plan operated as follows.

First, the customer was induced to give control or "discretion" over the account to Clayton, by misrepresentations about the trading strategies that would be followed. Jordan, 861 F.2d at 173-74; and see T.468-70, 796, 886-87 Second, though discretion had been obtained and would be exercised, making the accounts discretionary, all documentation would show the accounts as nondiscretionary; later when customers complained about the broker's trading of their accounts, Clayton Compliance or Legal Department officials would reject the complaints by pointing to the "nondiscretionary" documentation and telling the customer that he had no basis for complaint because he was obviously doing all the trading himself. Jordan, 861 F.2d at 174. Third, the discretion would be used to trade the accounts excessively and without any rational strategy, for the sole purpose of generating commissions, id., 174, with 60% of the commissions going to Clayton and 40% to the broker. Fourth, the discretion was also utilized to switch orders (i.e., "open" positions or contracts which had not yet been matched with corresponding contracts to create a "trade") from one account to another, id.; by watching the markets' price

movements it was possible for a broker to determine whether an open position would - if closed in the near future - produce a profit or a loss. Orders that would produce a profit were switched out of customers' accounts and into accounts that the broker controlled through a confederate or owned under a fictitious name. Id., 174. Such orders could also be switched into the account of a customer who had suffered large losses due to the aimless excessive trading; the resulting profit would both placate the customer and allow more excessive trading. Id. Fifth, customer complaints to the broker were met by more misrepresentations about trading strategies and by assurances that those strategies would recoup past losses. Id. Finally, Clayton management protected the broker, covered up the plan and helped fend off customer complaints. Id., 174, 175-76, and infra.

Illustrative of the coverup was the response of Clayton's management to "whistleblowing" by employees or ex-employees from the Kansas City office. When customer complaints in early 1980 prompted James Hanson (then-Manager of the K.C. office) to investigate a broker's conduct, conclude that the broker was defrauding customers and report that to management, Clayton removed Hanson as Manager and replaced him with the broker, Martin Rachlin. Jordan, 861 F.2d at 175. And when in August 1980 Rachlin's ex-assistant, Martha LaQuey (fired by him for refusing to cooperate with the plan) reported the order-switching and the names of some Rachlin confederates to the #2 man in the Compliance Department and he passed that on to the head of the Department (id.,176), nothing happened; six months later David Jordan's account would be caught up in the

order-switching. Customer complaints had to be handled, too, as was exemplified by Ellen O'Connell's complaints. Though in mid-1980 she twice complained directly to Clayton's General Counsel that Rachlin took control of her accounts, was excessively trading them and ignoring her directions to stop (T.827-28, 835), and though Clayton's records showed extensive switching of orders into and out of her accounts (which could only occur when the broker had control over the trading T.754-56), Rachlin was not stopped or disciplined and Compliance rejected her complaints by asserting that she, not Rachlin, did all the trading. T.844-45, 853-57; Ex. 381. (Though a number of the customers who testified at trial, including Mrs. O'Connell, had complained to the CFTC, T.858, 904, no CFTC investigation ever took place.)

The tactics of management and Rachlin were extraordinarily successful; by the time Clayton took control over Mr. Jordan's account (January 1981) the plan had been in operation for over two years. Jordan was induced by a series of misrepresentations about market trends, the planned trading strategy, and the profitability of that strategy to give discretion over his account to Clayton. Instr.8; T.464-72. Though Clayton thus gained discretion over Jordan's account, its records continued to show the account to be nondiscretionary. Ex.3. That notwithstanding, Rachlin immediately began trading at his discretion; in the five-six weeks he traded the account, his aimless excessive trading wiped out the approximately $7,000 balance, required Jordan to pay a $970 margin call and generated $5,292 in commissions. Jordan, 173, 175-76. An expert witness described the trading as following no strategy, except to make as many trades as

possible, most of them day-trades, and stated that such an approach was "a doomed strategy" in which the "customer can't come out ahead", the heavy drain of commissions requiring a monthly profit of 182% merely to pay off the commissions and leave the account at a break-even point. Id., 175-76. That trading was supplemented and furthered by order-switching. Infra.

When Rachlin's excessive trading left the account with a negative balance after only two weeks, three orders that would produce profits were switched into the Jordan account from other customers' accounts, wiping out the negative balance and allowing the trading to continue, Jordan, 173; the trading that followed generated an additional $2,300 in commissions. Days later two orders that would produce profits were switched out of Jordan's account and into an account Rachlin owned under the fictitious name "Xochilt Flores". Id.,173, n.1; Exs.15, 40d. None of that was known by Jordan because the trading records Clayton furnished to customers did not show that orders had been switched into or out of his account. Jordan, 173. It was known to Clayton management. Compliance Department employee Bradac learned of the "Flores" account well before the end of the trading in Jordan's account and again informed the head of the Department, but all that was concealed from Jordan. T.204-05, 547-49. All told, David Jordan lost $7,923.50.

That was a substantial injury to Jordan because he was retired and had a net worth of only slightly over $100,000 (T.602); the loss represented some 7-8% of his net worth. (Clayton put Jordan's net worth into evidence, id., and later did not object but

consented to admission of evidence of its net worth, id., 972; both figures were pertinent to calculation of any punitive damages award). The jury's verdict was returned on November 24, 1986.

ARGUMENT

I. Clayton Long Ago Waived The Due Process And CEA Preemption Questions It Now Belatedly Attempts To Raise.

In recent cases this Court has emphasized again and again that the consequence of failure to timely raise a question in the courts below is that the question will not be considered here. E.g., Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989); Banker's Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988). Both the District Court and the Eighth Circuit correctly held that Clayton waived, by not timely raising the Due Process and CEA preemption questions it now attempts to raise here. Jordan, 975 F.2d at 541 (preemption), 542-43 (Due Process). The record shows quite clearly that Clayton did not merely fail to raise the questions due to a brief oversight or omission; the preemption question was only first raised in the certiorari petition filed here in No. 88-1483, more than 6-1/4 years after this case began, and, as the District Court and Eighth Circuit agreed, the Due Process question was not raised until after the remand in No. 88-1483, more than 8-1/2 years after this case began. Clayton deliberately chose not to raise the questions.

Clayton flatly admitted in its petition in No. 88-1483 that it chose not to raise the CEA preemption question in the Courts below because of the Eighth Circuit's deci-

sion in Kerr v. First Commodity Corp., 735 F.2d 281 (8th Cir.1984) that the CEA did not preempt an investor's Missouri common law claim for actual and punitive damages against his brokerage firm; in Clayton's own words:

> "This point was not pressed in the District court or the Court of Appeals because of the Kerr decision".

Petition, No. 88-1483, p.7. That is a deliberate default.

Rather than mount a Due Process challenge to the Federal and Missouri standards governing calculation and review of the punitive damages award, Clayton used those standards at trial and on appeal to argue that the award was excessive on common-law grounds. Jordan, 861 F.2d at 174-77. When that failed, Clayton turned next to another form of "excessiveness" argument, raising as its No. 1 question in No. 88-1483 a Browning-Ferris argument that the punitive damages award was excessive under the 8th Amendment's excessive fines clause. Even though Browning-Ferris contained a Due Process challenge of the type decided in Haslip and now raised by Clayton, Clayton did not itself raise such a challenge in No. 88-1483, instead arguing for proof beyond a reasonable doubt (Question No.2) and bifurcated trials (Question No.3) in punitive damages cases. App.,p.11. Only after this Court remanded for reconsideration in light of Haslip did Clayton finally raise the Due Process challenge, in May 1991, 8-1/2 years after the case began. Jordan, 975 F.2d at 542-43. Both the District Court and the Eighth Circuit expressly held that Clayton had not raised anything resembling a Due

Process/Haslip question until after remand. Jordan, 975 F.2d at 542-43. That, too, was a deliberate default.

Under such circumstances, it is not appropriate to provide Clayton any further review, either by granting certiorari in this case, or by holding this case until the decision of TXO Production Corp. v. Alliance Resources Corp., No. 92-479. Clayton's deliberate defaults should preclude any further review. Clayton's repeated efforts to raise issues it waived years ago have dragged this case out to inordinate length - the case is now more than 10 years old, and Clayton is now requesting review of questions it did not even mention in the first 6-1/4 or 8-1/2 years of the case. The deliberate defaults warrant immediate denial of Clayton's petition for certiorari, and so does the meritlessness of Clayton's Due Process and preemption questions, as shown hereafter by Sections II and III.

II. Clayton Was Accorded All The Protection Required By Haslip, And More, And Nothing In The Federal And Missouri Standards Governing Punitive Damages Warrants Certiorari.

In this case Clayton has already received full reviews of three separate sets of challenges to the punitive damages award: (1) a Missouri common law excessiveness challenge, Jordan, 861 F.2d at 174-77, (2) an 8th amendment excessiveness challenge, No. 88-1483, and Jordan, 975 F.2d at 541, and (3) a Due Process/Haslip challenge. Jordan, 975 F.2d at 542. None of those reviews found any flaw in the punitive damages award, or in the procedures and standards by which the award was made and reviewed.

The Haslip reviews conducted by both the District Court and the Eighth Circuit found that the punitive damages instruction and the Federal and Missouri standards governing calculation and review of the punitive damages award fully met the requirements of Haslip. Jordan, 975 F.2d at 542. Clayton does not attempt to point out any error in those findings. Instead it deliberately attempts to mislead this Court into believing that no Haslip review was conducted on remand. Petition, pps.9-10, 18. That is an implicit admission that unlike the TXO case, this case contains no certworthy issue.

Unlike the TXO case, this case does not involve a multi-million-dollar punitive damages award, but only a $400,000 award, which was found to be well within Clayton's ability to pay and properly calculated to deter further wrongful conduct by Clayton. Jordan, 861 F.2d at 175. Unlike the TXO case, this case does not involve a 500-1 ratio between punitive and actual damages, but only a 50-1 ratio, which both the District Court and Eighth Circuit held was not excessive in rejecting Clayton's common law challenge to the award. Jordan, 861 F.2d at 174-76. And, unlike West Virginia law defining the degree of wrongful conduct required to support a punitive damages award, Missouri law does not use nebulous terms such as "really stupid" and "really mean", but instead precisely defines three degrees of malice - implied malice, legal malice, and actual malice, Sanders v. Daniel Internat'l Corp., 682 S.W.2d 803, 807-08 (Mo.1984) - and then requires proof of a higher degree of wrongdoing for a punitive damages claim than for the underlying tort claim. Proctor v. Stevens Employment Services, Inc., 712

S.W.2d 684, 687 (Mo.1986) ("A higher degree of malice should be required to award punitive damages than to find liability" for the underlying tort).

The Federal and Missouri procedures and standards so belatedly challenged by Clayton have passed successfully through so many reviews because they afforded more than ample protection to Clayton. Clayton's Due Process challenge to them is so belated precisely for that reason: the procedures and standards gave so much protection to Clayton that it decided its best chance for success lay not in challenging them, but rather in using them to mount a common-law challenge to the award. Jordan, 861 F.2d at 174-77. Unlike the West Virginia procedures and standards at issue in TXO, nothing in the Federal and Missouri procedures and standards used in this case warrants certiorari.

III. The Commodity Exchange Act Does Not Preempt David Jordan's State Common Law Damages Action Against His Brokerage Firm.

Introduction

At a time when widespread civil and criminal fraud in the futures industry have forced yet another toughening of the laws and penalties applicable to the industry (Futures Trading Practices Act, P.L.102-546) and made the CFTC's long-admitted[1] need for

---

[1] The CFTC has long admitted that it needs the help provided by private damages actions because it "is an agency with limited resources which are insufficient to per-

help in enforcing the laws pertaining to that industry seem greater than ever, Clayton contrarily proposes that this Court take away what has long been one of the most effective ways of providing that help: state common law damages actions against futures brokerage firms. Worse than the timing of the proposal is the manner in which it is made. The proposal, which takes the form of an argument that the 1974 amendment of the Commodity Exchange Act impliedly preempted all state common law damages actions, flies in the face of an obvious intent on the part of the 1974 Congress to preserve state common law and other private damages actions against brokers, brokerage firms and other market participants, an intent this Court recognized in Merrill Lynch v. Curran, 456 U.S. 353 (1982) (consolidated with Clayton Brokerage Co. v. Leist, No.80-895; Heinold Commodities, Inc. v. Leist, No.80-936; and New York Mercantile Exchange v. Leist, No.80-757, see, 456 U.S. 353, footnote) and says nothing at all about the longstanding judicial "consensus" that the CEA does not preempt such actions. Pettigrew v. Oppenheimer & Co., 582 F.Supp. 98,100 (D.Mass.1982) and see, cases cited infra.

Clayton's preemption argument has two basic parts. The first part begins by asserting that in 1947 in Rice v. Board of Trade this Court stated that but for the savings clause in Sec.4(c) of the CEA the Act would, in Clayton's own words, "probably preempt

---

mit it to police all commodity-related transactions". Leist v. Simplot, 638 F.2d 283, 321 (2nd Cir.1980), quoting CFTC Brief, 34.

state law otherwise governing the conduct proscribed by those provisions", and then goes on to suggest that such preemption did occur in 1974 when the savings clause in Sec.4(c) was repealed. Petition,13-14, citing Rice v. Board of Trade, 331 U.S. 247 (1947). The second part of the argument then attempts to leave the impression that there is some unspecified uncertainty or "controversy" over the scope of the CEA's preemption. Petition, 15-16. Under closer examination Clayton's argument falls apart.

The savings clause in Sec.4(c) of the CEA was repealed because it would not have allowed the limited implied preemption of state regulatory statutes (e.g., Futures Acts, Securities Acts) intended by the 1974 Congress, and because it was made superfluous by the new savings clause included in the 1974 amendment of the CEA, a clause drafted primarily for the purpose of preserving from preemption private damages actions of the type at issue here. Infra.

As Sec. A shows in more detail, in 1974 Congress restructured regulation of the futures industry by barring State regulatory agencies such as Securities Departments from exercising regulatory authority over the industry. See, Sec. A infra. It did that by impliedly preempting the regulatory statutes, such as Securities Acts, which the State agencies were using to assert jurisdiction over the futures industry. Id. Because Sec. 4(c) of the CEA precluded *any* preemption of state law it had to be repealed in order for that limited preemption to occur; Phillip Johnson, who became the first Chairman of the new Commodity Futures Trading Commission (CFTC) created by the 1974 amend-

ment, explained how repeal of Sec. 4(c) furthered the Congressional intent to preempt state regulatory statutes:

> "More specific insight into congressional intent to preempt the substantive provisions of other regulatory statutes, as well as the agencies themselves, can be found in the remarks of Senator Curtis on the Senate floor, where he successfully urged the repeal of a sentence in the pre-existing Commodity Exchange Act. (Section 4c). Senator Curtis explained that (the) sentence was incompatible with the CFTC's new exclusive jurisdiction and the intended preemption of all state agencies".

Johnson, Commodity Futures Trading Act, 29 Vand.L.Rev. 1, 33-34 (1976) (emphasis and parenthetic material added). However, Congress intended that preemption go no further than that, and to insure such a limitation, drafted the new savings clause. The discussions which preceded and informed the drafting made clear that Congress intended to preserve private damages actions against market participants such as brokerage firms, believing them to be a significant help to the CFTC in policing the markets because the threat of such damages actions provided industry members with

> "a significant incentive . . . to obey the law".

Curran, 456 U.S. at 384. Accordingly, when this Court, in Curran, summarized the his-

tory of the new savings clause it described the clause as the result of an effort to preserve private damages actions:

> "And when several Members of Congress expressed a concern that the exclusive jurisdiction provision, which was intended only to consolidate federal regulation of Commodity Futures trading in the Commission, might be construed to affect the implied cause of action as well as other Court actions, Congress acted swiftly to dispel any such notion".

Curran, 456 U.S. at 387. Furthermore, state common law figured prominently enough in those Congressional discussions that it was clearly understood that Congress did not intend to preempt state common law damages actions; thus, CFTC Chairman Johnson wrote, shortly after enactment of the 1974 amendment:

> "Presumably, any injured person will continue to be able to sue in federal or state court on any available legal theory, such as breach of contract, violation of the Act, or common law fraud".

Johnson, CFTC Jurisdiction, 25 Drake L.Rev. 61, 71 (Fall 1975).

Judicial recognition of the simple scope of the CEA's preemption followed quickly upon the 1974 amendment's enactment. The first three cases decided after enactment established an analytical framework that is still in place today: the CEA preempts statutes which allow a regulatory agency to assert regulatory authority over the futures industry, but does not preempt traditional state common law damages actions by investors against market par-

ticipants. Texas v. Monex International Ltd., 527 S.W.2d 804 (Tex.App. 1975) (Texas Securities Act preempted); International Trading Ltd v. Bell, 556 S.W.2d 420 (Ark 1977) (Arkansas Securities Act preempted; common law damages action against brokerage firm not preempted); Bache Halsey Stuart Inc. v. Hunsucker, 248 S.E.2d 567 (N. Car.App.1978) (North Carolina Unfair Trade practices Act preempted; common law damages action against brokerage firm not preempted). Contrary to the suggestions in Clayton's Petition there has never been any judicial uncertainty or "controversy" over that. No Court has ever held that a state common law damages action like David Jordan's - an investor's action against his brokerage firm - is preempted by the CEA. E.g., Kerr v. First Commodity Corp., 735 F.2d 281 (8th Cir. 1984); Kotz v. Bache Halsey Stuart Inc., 685 F.2d 1204 (9th Cir.1982); Khalid Bin Talal v. E.F. Hutton & Co., 720 F.Supp. 671 (N.D.Ill. 1989); Mallen v. Merrill Lynch, 623 F.Supp. 203 (D. Ga.1985); Patry v. Rosenthal & Co., 534 F. Supp. 545 (D.Kan.1982); and see cases cited in Annotation, Commodities Broker's State Law Duties To Customers, 55 A.L.R. 4th 394 (1987, 1992 Supp.). A substantial reason for that is the legislative history of the 1974 amendment to the CEA, as Sec. A shows.

A. The CEA's Limited Scope Of Preemption.

The 1974 amendment of the CEA marked a watershed in regulation of the futures industry. Congress was confronted with the dual needs of (1) ending infighting among federal and state regulatory agencies for power over the industry, and (2) substantially strengthening regulation of the industry. It chose to meet the first need by preempting regulatory statutes that were being used by various agen-

cies to assert jurisdiction over the industry and "consolidat(ing) Federal regulation of commodity futures trading in the" new CFTC, Curran, 456 U.S. at 387, and to meet the second by expanding and toughening the CEA's penalties, while not only preserving State statutory and common law public or private actions, but expressly encouraging the states to use their civil and criminal laws of general applicability, such as anti-fraud statutes, against industry wrongdoers. Infra.

The 1974 amendment focused on State regulatory statutes such as Securities or Futures Acts because the States were increasingly using or enacting such statutes to enable their own regulatory agencies to assert authority over the futures industry; a witness at the Senate Agriculture & Forestry Committee's hearings on the 1974 amendment summed up that trend:

> "Various other states are considering regulation of commodities either through a commodities act or by defining commodity contracts as a security. Michigan has this area under active review. The Wisconsin Securities Act already defines a contract for future delivery of a commodity as a security. The State of Arizona recently amended its Securities Act to define a commodity as a security and the States of Texas and Arkansas have recently, either administratively or judicially, found certain types of contracts for future delivery of a commodity to be a security, subject to their state securities laws".

Hearings Before the Senate Committee On Agriculture & Forestry: Commodity Futures Trading Act, 93rd Cong., 2d Sess.,p.752. Such statutes

were to be preempted by the 1974 amendment, CFTC Chairman Johnson explained, in order to preempt the State agencies using the statutes; the amendment's intent was:

> "to preempt the substantive provisions of other regulatory statutes, as well as the agencies themselves",

Johnson, 29 Vand. L.Rev. at 33-34, a statement fully concurred in by a later Congress which followed the lead of its 1974 predecessor in amending the CEA:

> "The 1974 Act, which established the CFTC bestowed on the CFTC exclusion (sic, exclusive) jurisdiction to regulate futures trading and enforce the provisions of the Act, thereby preempting any State regulatory laws".

H.R. Rep. No.97-565,p.44 (1982). However, that was as far as the preemption went. Private damages actions and various public actions were preserved from preemption, as the history clearly shows. Both Curran and Judge Henry Friendly's opinion for the Second Circuit in Leist, on whose extensive analysis of the legislative history Curran expressly relied (387, Fn.86), point out the importance Congress placed on preservation of private damages actions as an aid to enforcement; as Curran succinctly stated, the threat of such actions provided industry members

> "a significant incentive . . . to obey the law".

Curran, 384; Leist, 638 F.2d at 314-15.

Reference to private actions abound in the 1974 amendment's history, as both Leist and Curran show. Curran, 456 U.S. at 384-88;

Leist, 638 F.2d at 308-15. They began in the House, in the remarks made by Chairman Poage in introducing the amendment, 119 Cong.Rec. 41333, Curran, 383-84, Fn.71, Leist, 308, and continued throughout proceedings in that body. Curran, 383-88, Leist, 308-09. In the Senate such remarks reached a high point during the discussion in Committee about the possibility that the House draft of the 1974 amendment (H.R.13113) could be read as preempting not only state regulatory statutes but a wide variety of other bodies of law, a discussion featured prominently in both Curran and Leist.

Many concerns about just such a reading of H.R. 13113 were voiced. For instance, the Justice Department's Antitrust Division wrote to Senate Committee Chairman Talmadge expressing such concerns about the Federal antitrust statutes (Leist, 315 n. 37), concerns echoed by House Judiciary Chairman Rodino. Leist, 314-15. Chairman Rodino also expressed the concern that the amendment could even be read as preempting all state common law. Id., 314. That, so Chairman Rodino told the Senate Committee, was not needed to accomplish the amendment's purpose and was not intended by the House:

> "there does not appear to be any legislative intention or established need to achieve this preemption".

Hearings On S.2485, S.2578, S.2837 and H.R. 13113 Before The Senate Committee On Agriculture & Forestry, p.260 (emphasis added). Chairman Rodino proposed a pre-emption scheme analogous to that of the Federal securities statutes (id.), which would leave the states' common law intact and untouched by pre-emption. Id.

The House Committee which had produced H.R.13113 confirmed that no such sweeping preemption had been intended, as Senate Committee member Clark reported. Curran, 386; Leist, 315. Senator Clark, and other members, too, objected to such preemption, their objections repeating the by-now widespread notion that H.R. 13113 could preempt not just the CEA implied private right of action, but many other "court actions" as well:

> "Section 201 of that bill may prohibit all court actions. The staff of the House Agriculture Committee has said that this was done inadvertently and they hope it can be corrected in the Senate".

Curran, 456 U.S. at 386. In Curran's words: "It was". Id.. As this Court explained, "Congress acted swiftly to dispel any such notion", by adding the new savings clause to H.R. 13113. Curran, 456 U.S. at 387.

A clear concern evinced by Congress in discussing and drafting the new savings clause was to help the new CFTC in policing investor-broker relations; preservation of private damages actions, both Federal (implied private right of action under the CEA) and State (common law), would provide such help because such actions generally were brought by investors against brokerage firms, as in Curran itself (No. 80-203), 456 U.S. at 368. A second source of such help for the CFTC was found by Congress in state anti-fraud statutes which could be used by the States to protect investors from brokers, as the 1974 Congress told the States, in explaining why such statutes were not preempted:

> "(The 1974 amendment) does not prevent the states from enforcing their criminal anti-fraud statutes. The Committee realizes that many fraudulent schemes are devised to prey on the unsuspecting and unsophisticated investor. The States are encouraged to continue to utilize their criminal anti-fraud statutes to discourage such schemes",

Senate Report No. 94-73, pps.5-6 (1974) (parenthetical word added).

The 1978 and 1982 amendments did not see any change in the Congressional belief that the CFTC needed help in enforcing the law or in the importance given to private damages actions. "Widespread fraud" in certain areas of the industry persuaded Congress that the CFTC needed even more help, which the 1978 amendment sought to provide by allowing States to bring certain additional types of actions, including *parens patriae* actions. Leist, 638 F.2d at 319. That trend continued in the 1982 amendment, and in reaction to Clayton's and Merrill Lynch's challenges to the implied cause in Leist and Curran, which were then pending in this Court, Congress reiterated its belief in the importance of private damages actions, by expressly writing such an action into the CEA. House Rep.No. 97-565, pps.56-57, reprinted in U.S. Code Cong. & Admin. News, 97th Cong., 2d session, pps. 3905-06; Mallen, 623 F.Supp. at 204-06.

From the foregoing history the Courts have had no trouble divining the scope of the CEA's preemption, as sec. B shows.

B. Judicial Agreement Over The CEA's Scope Of Preemption

Over Pages 14-16 of its Petition Clayton attempts to leave the impression that there is judicial uncertainty or controversy regarding the CEA's scope of preemption. Thus, Clayton cites three cases - Kotz, Haines and Hunsucker - and says of them that "(t)he issue has been resolved by those courts in different ways for different reasons". Petition, 15-16. But even a quick reading of the cases shows that to be flatly untrue; the cases all simply apply the uniformly accepted rule that Congress intended the CEA to preempt regulatory statutes, but not state common law damages actions by investors against brokerage firms. Hunsucker, the first-decided of the three cases, held that an action under the North Carolina Unfair Trade Practices Act was barred because that statute was regulatory in its nature and thus preempted; however Hunsucker also emphasized that only such statutes were preempted and that a common law damages action by an investor against his brokerage firm was not preempted. Bache Halsey Stuart Inc. v. Hunsucker, 248 S.E.2d 567 (N.Car.App.1978). Haines merely involved the same kind of statute at issue in Hunsucker - the Massachusetts Deceptive Trade Practices Act - and like Hunsucker, found such a statute to be regulatory in nature and thus preempted. Haines v. First Commodity Corp, [1980-82 Binder], Comm.Fut.L. Rep. CCH, Sec. 21,088 (Mass. Super. Ct. 1980). Finally, Kotz did not hold, as Clayton's parenthetical note on Page 16 of its Petition suggests, that there was "no preemption" (Petition, 16) under the CEA; it merely held that the CEA does not preempt a state common law damages action for actual and punitive damages

by an investor against his brokerage firm. Kotz v. Bache Halsey Stuart, Inc., 685 F.2d 1204, 1207-08 (9th Cir.1982).

There is simply no judicial uncertainty or "controversy" over the CEA's scope of preemption. Congress made a sufficiently clear history for the 1974 amendment, and later amendments, that the Courts have had no difficulty in determining what preemption Congress intended. Had the Courts truly misread the Congressional intent as badly as Clayton suggests, the post-1974 amendments would surely have changed the savings clause to put in place the sweeping preemption which Clayton proposes Congress intended. That the post-1974 amendments did not change the savings clause is persuasive evidence that the Courts correctly read the savings clause (7U.S.C. sec.2) and the limitation Congress intended it to put on preemption, for, as this Court held in Curran: "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change". Curran, 456 U.S. at 381-82.

CONCLUSION

Both the Due Process/Haslip and CEA preemption questions which Clayton has so belatedly attempted to raise are barred by its longstanding procedural defaults, as both the District Court and Eighth Circuit held. Furthermore, neither question presents the "special and important reasons" for review that are required by Rule 10. Thus, there is no basis for certiorari.

Nor is there any basis for holding this case until decision of TXO. Clayton's procedural default on the Due Process/Haslip question is so longstanding and so clearly delib-

erate that it cannot be entitled to any review on the merits. In any event, it has already received two full Haslip reviews and two full common law reviews, as well. All it hopes to do now is further delay the case, something it has already done for years. Certiorari should be denied forthwith.

Respectfully submitted,

WILLIAM C. PARTIN
MATTHEW K. PARTIN
Suite 330
1310 Carondelet Drive
Kansas City, MO 64114
Telephone: (816) 942-7880
Telecopier: (816) 942-0656
Counsel for Respondent
David T. Jordan

APPENDIX

TRANSCRIPT
(p. 972, line 11 - p. 976)

THE COURT: Any objection if they read those portions of Exhibit 48?

MR. COWDEN: Yes, Your Honor. First of all, we object to reading any portion of the consolidated statement of financial condition of Clayton for the reason that our position is that a submissible case on punitive damages has not been made.

If the Court determines that a submissible case on punitive damages has been made, then we object to any reference to the total assets and total liabilities of the company.

Our position is that only one figure, that being the total stockholders' equity, which according to this exhibit is $17,491,724, should be read to the jury. We would object to any reference to any other figure or wording on the consolidated statement of financial condition. Specific-

ally, we object to plaintiff's proposed reading of the contingent liabilities paragraph.

I don't -- that is one that I don't believe there is any support whatsoever in the case law for allowing plaintiff's counsel to read such a statement to the jury concerning contingent liabilities, the opinion of management, based upon consultation with their outside counsel about contingent cases which are not identified specifically and it would lead to -- could lead to defendant having to put on evidence about, I suppose about every other contingent liability in the form of a legal action that is presently pending against the company to explain what was meant by that statement, and the basis for that statement.

Of course, it is hearsay and an opinion contained within a hearsay statement. So our position is, even if punitive is submissible under the law of Missouri,

and the law and practice of the 8th Circuit, that only one figure, that of total stockholders' equity should be ready to the jury.

THE COURT: What authority do you have that, Mr. Partin, that would authorize you to read the total assets and the total liabilities?

MR. MATTHEW PARTIN: Well, I think --

THE COURT: And the stockholders' equity?

MR. MATTHEW PARTIN: Well, we got some cases in the supplemental trial brief we filed, Judge, Missouri cases, in which the Missouri Supreme Court -- let me start all over again.

There is one case cited in the supplemental trial brief called Haswell versus -- I think it is Liberty Mutual. It is 557 SW 2nd something something. It is a Missouri Supreme Court decision from the '70's, in which the plaintiff's counsel in

that case made an argument to the effect that the defendant's total assets are, and gave the figure, I suggest you make an award equal to, and then proposed a percentage figure of the total assets.

We don't propose to make that kind of argument, but I think the case is authority for the proposition that asset figures even by themselves could come in. Here, we are simply offering them to show how the $17 million figure was derived. I think that is within the authority of the line of cases that of course allow evidence of net worth.

We are simply showing the components that give rise to the net worth by reading the assets and the liability figures. If we are just reading one or the other, I suppose that might be a different matter, although in light of the Haswell case, I am not sure of that. But what we are doing here is simply showing how the net worth figure is arrived at.

As for the contingent liabilities paragraph, I don't know of any case in Missouri -- well, I should say I don't know of any reported appellate opinion in Missouri in which this issue has come up. We simply propose to read that there has been evidence in this case there are pending lawsuits against Clayton involving Mr. Rachlin and his activities in the accounts of other customers.

This is just really a subject that is unexplored in the case law, I think. It is conceivable to me that in a situation like this the jury might wonder about the effect of the pendency of the other lawsuits on the financial condition, more particularly on the ability to pay of the defendant.

So that paragraph is directed to that concern. I guess what I am saying in essence is, the paragraph is further indication beyond the numbers that we are going to

read of the ability of the defendant to pay a punitive damages award, which of course under Missouri law is the only reason for offering this type of evidence, to show an ability to pay.

MR. COWDEN: The only thing further, as the Court knows, the purpose of punitive damages is two-fold: Number one, to deter future conduct by this defendant or by others in a similar position.

Number two, to punish this defendant for acts that have occurred if the jury sees fit. In determining whether to punish, there is one figure on this exhibit that is relevant, and that is the net stockholders' equity. That is that amount of money that would be available to pay to either this plaintiff or anybody else at this point in time. So that is the figure that is relevant on the defendant's ability to pay and with respect to the issue of possible punishment.

I believe that is the traditional way in which corporations' net equity is shown to the jury is to read this one figure, to advise the jury the total of the stockholders' equity of Clayton Brokerage Company is, and then to quote the figure. It is up to plaintiff's counsel, I suppose, in closing argument if he so sees fit to advise the jury as to how they are supposed to use that number, if at all.

I think it would be very confusing to the jury if they are given a figure of $46,737,713 in total assets, and they are given a liability figure, and then they are given a total net stockholders' equity figure.

THE COURT: I agree with you. I think net worth is the only dollar figure under the circumstances of the information available here, that should be read to the jury.

TRANSCRIPT

(p. 1062, Line 10 - p. 1063, line 5;
Complete Statement Of Clayton's Net
Worth Objection In Instruction Conference)

The equal protection of the law clause comes into play because plaintiff has placed before the jury a figure which represents defendant Clayton's shareholders' equity or net worth, which was something in excess of $17 million. It is anticipated that plaintiff's counsel will argue in his closing argument that the jury should consider the net worth of the defendant in deciding whether to punish the defendant.

Therefore, the argument will be that because this defendant has a certain amount of financial wealth, or put in another way, a certain net worth, that it is more appropriate to punish this defendant than it would be to punish another defendant under similar circumstances who has a net worth that is less than this defendant's.

Therefore simply because this defendant has a certain net worth which is before the jury, it is subject to possible punishment, whereas another defendant with a smaller net worth would not be subject to the same punishment.

THE COURT: Anything further?

MR. COWDEN: No, Your Honor.

TRANSCRIPT

(p. 1097, line 18 - p. 1098, line 3; Plaintiff's Closing Argument Re Net Worth)

How much should you give in punitive damages? Basically, that is up to you. When we brought this suit, we had to name a figure. We did. We said $1,600,000.

Here are some guidelines; David Jordan was worth $100,000 when Clayton did this to him. You heard Mr. Baty read that from his application. $100,000 was Mr. Jordan's net worth, his life savings.

Clayton took $8,000 of that from him. Well, that is eight percent of his net worth. Clayton is worth about $17,500,000. But if you took eight percent from Clayton, that would be $1,400,000.

CLAYTON CERTIORARI PETITION
(No. 88-1483)

QUESTIONS PRESENTED FOR REVIEW

1. Whether an award of punitive damages in a civil case violates a defendant's right under the Eighth Amendment to the Constitution of the United States to be free from excessive fines where the award of punitive damages is approximately fifty times the actual damages determined to have been incurred by the plaintiff?

2. Whether an award of punitive damages against a defendant in a civil cases is constitutionally permissible where the plaintiff has not been required to establish the wrongdoing and defendant's liability for such wrongdoing beyond a reasonable doubt, and liability has been determined based on the preponderance of the evidence?

3. Whether, in a civil case in which punitive damages have been prayed for, a defendant's rights to equal protection under the law and due process are violated when the jury is presented with evidence of a defendant's net worth prior to reaching a verdict on the defendant's liability (a) for the tort alleged and (b) for punitive damages?

4. Whether Sections 4b and 4c of the Commodity Exchange Act as amended, 7 U.S.C. __6b, 6c preempt state law which would otherwise apply to the conduct described in those statutory provisions, so as to render erroneous a judgment based on a claim arising under state law for conduct specifically governed by those statutory provisions?